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NO.

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1982

WILLIAM L. HAMILTON
and
JUANITA S. MEAD, APPELLANTS

v.

COMMONWEALTH OF VIRGINIA
APPELLEE

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY APPEAL

1. Do §19.2-187 and §19.2-187.1 of the Code of Virginia 1950, as amended, as applied by the trial court and approved by the Supreme Court of Virginia, violate the Confrontation Clause of the Sixth Amendment of the Constitution of the United States and the Due Process Clause of the Fourteenth Amendment in that said statutes authorized an objected to Certificate of Analysis to be admitted into evidence when:

(A) Neither the person who performed the analysis nor anyone else who had knowledge of the opinion expressed therein was available for cross-examination even though Appellants had caused a summons to be issued to secure the presence of said analyst;

(B) The certificate contained no

indicia of reliability on its face;

(C) The certificate reportedly connects Appellants with the commission of the crime;

(D) The prosecution made no showing as to the unavailability of the analyst or even his whereabouts, and

(E) The prosecution failed to produce said certificate although all relevant scientific reports were specifically requested by Appellants and ordered to be produced by the trial court.

2. Does Rule 5:20 of the Rules of the Supreme Court of Virginia authorizing denial of a Petition for Appeal by "Notice" violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution since Appellants' felony convictions are predicated on evidence allegedly admitted in violation of their constitutional rights, but said convictions are not supported by any opinion that effectively addresses and properly resolves the constitutional issues raised?

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REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

No written opinion was delivered by the Supreme Court of Virginia or by the trial Court. The order of the Supreme Court dated June 4, 1982, "finding no reversible error..." is set forth in the Appendix, infra at A-31 and the order of the trial Court is is set forth in the Appendix, infra at A7-30.

The overruling of Appellants' objection by the trial Judge and the argument preceeding the ruling are set forth in the Appendix, infra at A1-6.

STATEMENT OF GROUNDS INVOKING JURISDICTION

This is an appeal from the order dated June 4, 1982 of the Supreme Court of Virginia which refused Appellants' Petition for Appeal. The Petition for Appeal, filed on November 9, 1981, prayed that an Appeal be granted from their

convictions on July 9, 1981 in the Circuit Court of Bath County of breaking and entering and grand larceny. Your Appellants filed their Notice of Appeal in the Supreme Court of Virginia on August 30, 1982. Said Notice of Appeal is set forth in the Appendix, infra at A32-33. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(2). This appeal challenges the constitutionality of §19.2-187 and 19.2-187.1 of the Code of Virginia 1950, as amended, on the grounds they are repugnant to the Constitution of the United States, Amendments VI and XIV, in that said statutes, as applied by the lower courts, denied your Appellants the right to (1) confront and cross-examine the analyst who prepared the Certificate of Analysis in violation of the Sixth and Fourteenth Amendments and (2) discovery of the Certificate of Analysis which was material and had been specifically requested by Appellants and ordered to be produced

by the trial Court. This appeal also challenges the constitutionality of Rule 5:29 of the Rules of the Supreme Court of Virginia to the extent that said rule authorizes the Supreme Court of Virginia to dispose of Constitutional Rights, the violation of which was alleged by Appellants, without any written opinion in the record effectively addressing and properly resolving the issues raised.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Amendments VI and XIV of the Constitution of the United States, Sections 19.2-187 and 19.2-187.1 of the Code of Virginia 1950, as amended, and Rule 5:29 of the Rules of the Supreme Court of Virginia. Said constitutional amendments, statutes and rule are set forth in the Appendix, infra A45-49.

STATEMENT OF THE CASE

On August 17, 1980, an automobile

was reported stolen from a store house in Bath County, Virginia. A cannibalized automobile with a corresponding I.D. Number was found in West Virginia. Pursuant to a search warrant, a right and left valve cover were seized in an outbuilding located on Appellants' premises. These valve covers and the right and left engine heads of the vehicle found in West Virginia were sent to the Western Laboratory of the Commonwealth of Virginia's Division of Consolidated Laboratory Services, Bureau of Forensic Science, located in Roanoke, Virginia where they were apparently examined by James E. Hamby, hereinafter referred to as "analyst". A Certificate of Analysis, hereinafter referred to as "certificate", (a copy of which is contained in the Appendix, infra at A34-36) purportedly signed by the analyst before a Notary Public, was filed on September 10, 1980, in the General District Court of Bath County. No notice of said filing was given to the defense. Subsequent to this filing

but prior to any preliminary hearing in said court, the Commonwealth's Attorney nolle prossed the original arrest warrants. Appellants were indicted on identical charges in the Circuit Court of Bath County. The trial Judge pursuant to Appellants' Motion for Discovery ordered on October 17, 1980, that the Commonwealth produce all relevant scientific reports. Said Discovery Order is set forth in the Appendix infra at A37-41.

On June 20, 1981, the Commonwealth's Attorney filed said certificate in the Clerk's Office of the Circuit Court of Bath County, but again no notice was given to your Appellants of the filing. Your Appellants learned of the certificate on July 2, 1981. Pursuant to §19.2-187.1 of the Code of Virginia 1950, as amended, the defense requested the Clerk to summons the analyst. (See Appendix, infra at A-42) Apparently because of the Fourth of July holiday, the summons was not issued until

July 6, 1981. The summons does not show whether service was effected. At the trial held on July 8 and 9, 1981, Appellants objected to the introduction of the certificate because the analyst was not present to be cross-examined by your Appellants, and Appellants were unaware of the existence of the certificate until July 2, 1982. The prosecution never stated any reasons why the analyst was not available at trial. The trial Court overruled Appellants' objection stating without explanation: "the defense has not used due diligence to acquire his presence here." (contained in Appendix, infra at A1-6)

REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The decision below implicity sustaining the statutes in question directly conflicts with the Sixth and Fourteenth Amendments of the Constitution of the

United States and the decisions of this Court.

The right granted to an accused by the Sixth Amendment to confront the witnesses against him, which includes the right to cross-examination, is a fundamental right essential to a fair trial and is made obligatory on the states by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965). In 1895, this Court stated that

> "the primary object of the (Confrontation Clause of the Sixth Amendment)...was to prevent depositions or ex parte affidavits ...being used against the prisoner in lieu of a personal examination and cross-examination of the witnesses in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895). See also Barber v. Page, 390 U.S. 719, 721, 88 S.Ct. 1318, 20 L.Ed. 2d 255 (1968).

The certificate was simply an ex parte affidavit and clearly hearsay, but the trial Judge apparently concluded that §19.2-187 of the Code of Virginia 1950, as amended, authorized the introduction of such hearsay in the instant case.

It is conceded that the Confrontation Clause has never been interpreted to bar all hearsay evidence in a criminal trial. Mattox v. United States, supra, Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed. 2d 293 (1972), Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970). On the other hand, no particular declaration is necessarily free from a constitutional violation of the right to confrontation simply because it is admissible under a hearsay exception in the state's rules of evidence. Dutton v. Evans, id. Speaking for the Court in California v. Green, 399 U.S. 149, 155-56, 90 S.Ct. 1930, 26 L.Ed. 2d 489 (1970), Mr. Justice

White said:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See Barber v. Page, 390 U.S. 719 (88 S.Ct. 1318, 20 L.Ed. 2d 255); Pointer v. Texas, 380 U.S. 400 (85 S.Ct. 1065, 13 L.Ed. 2d 923.)

It is respectfully submitted that previous cases of this Court hold there is no violation of a defendant's right to confront the witnesses against him if objected to hearsay is admitted when:

First: The declarant is present at trial to be cross-examined on his statement. California v. Green, supra.

Second: The evidence offered under

the hearsay exception bears its own "indicia of reliability" Dutton v. Evans, supra 400 U.S. at 89, California v. Green, supra 399 U.S. at 149, Mancusi v. Stubbs, 408 U.S. at 216, and either:

A. The hearsay is not offered to prove an essential element of the crime or to connect the defendant directly to the commission of the crime, or in other words, the statement is neither "crucial" to the prosecution nor "devastating" to the defense, Dutton v. Evans, 400 U.S. at 87, or

B. The declarant is legally "unavailable", i.e. (1) the prosecution has made a good faith effort to secure the witness, Barber v. Page, supra 390 U.S. at 724, 725 or (2) the declarant cannot be produced, Mancusi v. Stubbs, supra, Mattox v. United States, supra.

Addressing the facts in the instant case, it is clear that none of the criteria mentioned are present.

First: The witness was not present at trial although summoned by the defense.

Second: There are no indicia of reliability contained in the analysis. There is nothing to indicate that this particular employee of the state was any more honest, reliable or correct in his opinion than any other witness. Opinion testimony has normally been excluded unless provided by an expert, but no qualifications are evident from the certificate itself. Regardless, no cross-examination was possible concerning whether the analyst was qualified, what procedures, mechanical devices, chemical tests, etc. he used to reach his opinion, nor to test his degree of certainty. Quoting from Wigmore §1357, this court has stated: "Confrontation...forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of the truth." California v. Green, supra 399 U.S. at 158.

Third: The certificate was crucial to the prosecution and devastating to the defense because it opines that the valve covers found on the premises of the defendants were removed from the stolen car.

Fourth: The Commonwealth did not make a good faith effort to obtain the presence of the desired witness, and apparently made no effort other than preparing a summons that was never served or attempted to be served on the analyst. There is nothing in the record to establish that the witness was unavailable. As an employee of the State, a simple phone call might have secured his presence.

In conclusion, the certificate was simply an ex parte affidavit, the admission of which has been condemned by this court as early as 1895, U.S. v. Mattox, supra 156 U.S. at 242-43. It denied to your defendants the right to cross-examine the witness, thereby denying them the Fourteenth Amendment's guarantee of due process of

law. Pointer v. Texas, supra, 380 U.S. at 405.

This case is of substantial interest in that it involves statutes that modified the hearsay rules of the Commonwealth and those of the common law. The creation of a new hearsay exception for the admission of evidence against a defendant, raises "...questions of compatibility with the defendant's constitutional right to confrontation. Such questions require attention to the reasons for, and the basic scope of, the protections offered by the Confrontation Clause." California v. Green, 399 U.S. at 156. Furthermore, various State and Federal Courts have greatly differed on their interpretations of whether lab reports violate the Confrontation Clause. For example, Virginia apparently still adheres to the rule that the right to be confronted with one's accusers and witnesses does not

operate to exclude proper laboratory reports especially if such evidence contains "no opinion." Robertson v. Commonwealth, 211 VA 62, 175 S.E. 2d 260 (1970). The same case was similarly decided in the Federal District Court for the Western District of Virginia. Robertson v. Cox, 320 Supp. 900 (W.D. VA 1970), citing with approval Kay v. United States, 255 F2d 476 (4th Cir.) cert. denied, 358 U.S. 825, 795 Ct. 42, 2 L.Ed. 2nd 65 (1958). See also United States ex rel Lurry v. Johnson, 378 F. Supp. 818 (E.D. Pa. 1974). It is respectfully submitted these cases are in conflict with the decision of the Courts of Appeal for the Sixth Circuit, Phillips v. Neil, 452 F 2d 337, cert. denied 409 U.S. 884, 935 S.Ct. 96, 34 L.Ed. 2d 141 (1972), and the Second Circuit, United States v. Oates, 560 F. 2d 45 (1977). See also United States v. Puco, 476 F 2d 1099 (2d Cir.) cert. denied 414 U.S. 844, 94 S.Ct. 106,

38 L.Ed. 2d 82 (1973), Reardon v. Manson, 491 F. Supp. 982, remanded on other grounds, 644 F. 2d 122 (1981). For a state case supporting the position of your Appellants, see State v. Henderson, 554 S.W. 2d 117 (Tenn. 1977); for a state case, factually distinguishable from the instant case admitting a lab report, see State v. Krek, 86 Wash., 2d 112, 542 P 2d 782, 784 (1975).

The Virginia statutes as interpreted by the Trial Court and Virginia Supreme Court are unconstitutional in that they required that Appellants produce the witness. The statute provides that the defendant has the "right to call the person performing such analysis or examination...as a witness therein and examine him in the same manner as if he had been called as an adverse witness." This right is meaningless, however, if even though the defense has the person summoned as soon as it learns of the

existence of the analysis, the constitutional right can be subverted if for some unknown reason the analyst fails to appear. In fact, the failure to produce the witness violated your Appellants' constitutional right also guaranteed under the Sixth Amendment "...to have compulsory process for obtaining witnesses...."

They are further unconstitutional in that they did not provide that the certificate was inadmissible if not disclosed pursuant to a specific discovery request order. The failure on the part of the Commonwealth's Attorney to furnish the requested material was prejudicial to Appellants. It effectively prevented them from securing the attendance of the analyst which Virginia Statutes, as interpreted by the Court below, required. Appellants contend that the evidence produced by having the analyst present at trial would have been material and exculpatory. They believe, and therefore allege, that doubt would have been cast upon his opinion and

conclusion expressed therein. In this case, as in Brady v. Maryland, 373 U.S. 83 (1963), the request for the scientific report was specific. Mr. Justice Stevens in the majority opinion of United States v. Agurs, 427 U.S. 97 at 106 (1975) stated:

> It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial Judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if every, excusable.

The report was clearly material, and Appellants were prejudiced by the inexcusable failure of the Commonwealth's Attorney to disclose it. In addition to the failure to produce the aforesaid certificate, the Commonwealth's Attorney,

as alleged in Appellants' Petition for Appeal to the Supreme Court of Virginia, failed to produce other scientific reports, e.g. a Certificate of Analysis that no fingerprints were on the valve covers, and an exculpatory statement by Ed Cook, an alibi witness for the defense, which was effectively but improperly used by the Commonwealth at trial to cross-examine said witness. In light of the fact that the Commonwealth's Attorney failed to produce certain material required by the Discovery Order and the Constitution, it is respectfully requested that this Court require the Commonwealth's Attorney to file with this court all scientific reports and, as requested in Appellants' Petition for Appeal, the Prosecutor's report prepared by Officer Chapman.

With regard to the second question presented, Appellants contend that the failure

of either the trial court or the Supreme Court of Virginia to prepare a written opinion concerning Appellants' allegations of denial of Constitutional rights places on them an unconstitutional burden on appeal. This in turn denies them th; right of due process of law guaranteed under the Fourteenth Amendment. Due process necessarily means the right to review the actions of trial Court and lower Appellate Courts. Since Appellants convictions did not include confinem nt, they are precluded from raising the constitutional issues by habeas corpus. Thus, this court is the sole forum for any relief to Appellants. It is respectfully submitted that without a written opinion this Court has the difficult burden of determining the facts found, and the law applied by the lower Courts. It is respectfully submitted that this Court should hold that

a state felony conviction predicated upon material evidence the admission of which is alleged to have violated a right guaranteed by the Constitution, must be supported by a written opinion that effectively addresses and properly resolves the Constitutional issue.

For the foregoing reasons, the question presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution.

Respectfully submitted,

Malcolm H. Crawford